Public Finance Bhd v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42–54 OF 1998
NIK HASHIM J
13 AUGUST 1999

Criminal Procedure *— Forfeiture — Motor car seized — Whether forfeiture valid — Whether illegal property — Whether presumption of illegal property rebutted — Dangerous Drugs (Forfeiture of Property) Act 1988 ss 2(2), 25, 32(3) & 35*

A Honda Civic motor car No BDC 1328 ('the car') was seized from one Azlin under s 25 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act'). The sessions court issued out a summons to Azlin and the appellant, calling them to establish their respective claims for the release of the car. It was not in dispute that the car was owned by the appellant but it has been hired under a hire purchase agreement to one Mohd Anwar bin Amran, the hirer. The hirer did not make any claim although he was notified of the proceeding. Azlin told the court that he bought the car from proceeds of his business and also drugs. The sessions court judge found that the car was an illegal property and ordered the forfeiture of the car and hence the appellant appealed.

Held, allowing the appeal.

(1) The court in the proceeding under s 32(3) of the Act shall order the property to be released if: (i) the person claiming the property is lawfully entitled thereto; (ii) no offence under the Act or under the Dangerous Drugs Act 1952 ('the DDA') has been committed in respect of the property; and (iii) such property is not illegal property. The property shall be forfeited if any of the above conditions are not met (see p 147F–H).

(2) The presumption of illegal property under s 35 has been rebutted by the appellant. The facts of the case show that the car was never an illegal property right from the inception. The car was bought by the appellant and was hired out to Mohd Anwar under the hire-purchase agreement the terms of which clearly prohibits the transfer of the car to a third party without the appellant's consent. Furthermore, the evidence of the alleged purchase by Azlin was not substantiated. Azlin's evidence that he had bought the car from the proceeds of dadah is vague and should not be accepted without corroboration. On evidence, the car is not illegal property as defined under s 2 of the Act. Since the appellant has established that it was lawfully entitled to the car, and that the car was not illegal property, and that no offence has been committed in respect of the car, it should therefore be released to the appellant (see p 148C–E, G–I).

[**Bahasa Malaysia summary**

Sebuah kereta Honda Civic No BDC 1328 ('kereta tersebut') telah dirampas daripada seorang bernama Azlin di bawah s 25 Akta Dadah Berbahaya (Perlucuthakan Harta) 1988 ('Akta tersebut'). Mahkamah sesyen mengeluarkan saman kepada Azlin dan perayu, memanggil mereka untuk membuktikan tuntutan masing-masing untuk melepaskan kereta tersebut. Adalah tidak dipertikaikan bahawa kereta tersebut adalah dipunyai oleh perayu tetapi telah disewa di bawah suatu perjanjian sewa beli kepada seorang Mohd Anwar bin Amran, penyewa tersebut. Penyewa tersebut tidak membuat apa-apa tuntutan walaupun beliau telah diberitahu berkenaan dengan prosiding ini. Azlin memberitahu mahkamah bahawa beliau membeli kereta tersebut daripada hasil perniagaan beliau dan juga dadah. Hakim mahkamah sesyen memutuskan bahawa kereta tersebut adalah harta yang menyalahi undang-undang dan memerintahkan perlucuthakan kereta tersebut dan maka perayu merayu.

Diputuskan, membenarkan rayuan:

(1) Mahkamah di dalam prosiding di bawah s 32(3) Akta tersebut akan memerintahkan harta tersebut dilepaskan jika: (i) orang yang menuntut harta tersebut adalah secara sah berhak kepadanya; (ii) tiada apa-apa kesalahan di bawah Akta tersebut atau di bawah Akta Dadah Berbahaya 1952 ('ADB') telah dilakukan berkenaan dengan harta tersebut; dan (iii) harta sedemikian bukan harta yang menyalahi undang-undang. Harta tersebut akan dilucuthakkan jika mana-mana syarat-syarat di atas tidak dipenuhi (lihat ms 147F–H).

(2) Anggapan harta yang menyalahi undang-undang di bawah s 35 telah dipatahkan oleh perayu. Fakta-fakta kes menunjukkan kereta tersebut tidak pernah merupakan harta yang menyalahi undang-undang daripada permulaannya. Kereta tersebut telah dibeli oleh perayu dan telah disewa kepada Mohd Anwar di bawah perjanjian sewa beli yang mana terma-termanya telah dengan jelasnya melarang pemindahan kereta tersebut kepada pihak ketiga tanpa persetujuan perayu. Tambahan lagi, keterangan berkenaan dengan pembelian oleh Azlin yang dikatakan itu tidak disahkan. Keterangan Azlin bahawa beliau telah membeli kereta tersebut daripada hasil dadah adalah tidak jelas dan tidak seharusnya diterima tanpa sokongan. Berdasarkan keterangan, kereta tersebut bukannya harta yang menyalahi undang-undang seperti yang didefinisikan di bawah s 2 Akta tersebut. Memandangkan perayu telah membuktikan beliau secara sahnya berhak kepada kereta tersebut, dan bahawa kereta tersebut bukan merupakan harta yang menyalahi undang-undang, dan tiada kesalahan telah dilakukan berkenaan dengan kereta tersebut, maka ia seharusnya dilepaskan kepada perayu (lihat ms 148C–E, G–I).]

Notes

For cases on forfeiture, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1413–1504.

Legislation referred to

Dangerous Drugs (Forfeiture of Property) Act 1988 ss 2(2), 25, 32(3), 35

Manjit Singh Sachdev (*JK Phua* with him) (*Manjit Singh Sachdev Mohammad Radzi & Partners*) for the appellant.

Fatnin bte Yusof (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Nik Hashim J: This is an appeal against the decision of the Sessions Court Judge, Kuala Lumpur who ordered the forfeiture of the Honda Civic motor car No BDC 1328 (the car) that was seized by the police under s 25 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act').

The facts

The car was seized from one Azlin whom the police suspected to be involved in dangerous drugs activities. Pursuant to the powers conferred by s 32(3) of the Act, the sessions court issued out a summons to Azlin and the Public Finance Bhd, the appellant, calling them to establish their respective claims for the release of the car. It was not in dispute that the car was owned by the appellant but it has been hired under a hire purchase agreement to one Mohd Anwar bin Amran, the hirer. The hirer did not make any claim although he was notified of the proceeding. Clause 8.1.1 of the hire purchase agreement contained the usual terms that the hirer shall not sell, transfer, dispose of or part with the possession of the car, the hirer shall also not use or suffer the car to be used contrary to law or in any manner by reason of which the car may become liable to forfeiture and in the event of any breach by the hirer, the hiring shall automatically terminate and the hirer shall no longer be in lawful possession of the car with the owner's consent.

At the proceeding held by the sessions court, Azlin told the court that he bought the car from the hirer for RM40,000 and he had already paid RM15,000 towards the purchase price. According to him, the car could not be transferred to him as it was seized by the police. In his testimony, he said:

> Pembelian kereta itu adalah dari hasil perniagaan satay dan sedikit sebanyak dari hasil dadah.

Sessions court's decision

The sessions court judge found that the car was illegal property and hence the order of forfeiture. In his short judgment, the judge at p 20 of record said:

Setelah mendengar dan mempertimbangkan penghujahan semua pihak, terutamanya pihak penuntut kedua (the appellant), saya berpendapat kenderaan tersebut adalah satu 'harta tidak sah' sepertimana ditakrifkan di bawah s 2 ADB (PH) 1988 ...

Di dalam kes ini penuntut pertama (Azlin) dengan jelas mengakui bahawa kenderaan tersebut dibiayai sebahagiannya oleh wang dari sumber pengedaran dadah. Ini sudah memadai untuk menjadikannya satu harta tidak sah sepertimana ditakrifkan di atas.

Dari sudut ini adalah tidak releven sama ada penuntut kedua (appellant) tahu atau tidak akan kedudukan di atas. Begitu juga untuk tujuan s 32(3) itu kedudukan pemilikan sah ke atas kenderaan itu juga tidak relevan ...

Dari itu, pelepasan harta berkenaan kepada mana-mana penuntut-penuntut (Azlin and appellant) tidak diwajarkan di bawah s 32(3) ADB (PH) 1988 ... Dengan itu saya menolak kedua-dua permohonan dan memerintahkan harta berkenaan dirampas.

The appellant was dissatisfied with the decision and hence this appeal. Azlin did not appeal against the order.

Appellant's contentions

Before me, learned counsel for the appellant submitted that there is no evidence linking to the car that an offence has been committed in respect of the car and that it was never illegal property from the inception. Counsel also contended that the presumption under s 35 did not apply to the appellant as the appellant unlike Azlin, was not a person 'proceeded against' in the proceeding. Since the appellant is the owner of the car by virtue of the hire purchase agreement which forbids the sale by the hirer, the appellant is therefore lawfully entitled to the car.

Public Prosecutor's argument

The learned deputy public prosecutor, on the other hand, argued that the learned sessions court judge was right in his decision to forfeit the car as he was not satisfied that the car was not illegal property.

Issue

The issue before the court is whether upon the proper reading of the relevant provisions of the Act, the car is illegal property.

Judgment

In order to resolve the above issue I consider it necessary to reproduce the relevant provisions of the Act.

Section 25 states:

(1) Any movable property which a senior police officer reasonably suspects to be the subject matter of an offence under this Act, or which has been

A used for the commission of that offence, or illegal property, shall be liable to seizure.

Section 2(2) defines 'illegal property' to mean

'any property, whether within or outside Malaysia —

B (a) which is wholly or partly derived or obtained from or by means of any prohibited activity carried out by any person after the commencement of this Act

(b) to (g) ...

Section 32(3) provides:

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The Sessions Court to which a claim is referred under subsection (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the Sessions Court shall proceed to the examination of the matter and D if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited.

E Presumption as to illegal property is provided for under s 35 which reads:

Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, the court shall presume that person to be a liable person and that property to be illegal property, unless the person F proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same.

Thus, in the proceeding under s 32(3), the sessions court shall, after examination of the claim in respect of the seized property, order the G property to be released if the Court is satisfied that:

(i) the person claiming the property is lawfully entitled thereto;

(ii) no offence under the Act or under the Dangerous Drugs Act 1952 ('the DDA'), has been committed in respect of the property; and

(iii) such property is not illegal property.

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In any other case, the court shall order the property to be forfeited. In other words, the property shall be forfeited if any of the above conditions are not met.

It is pertinent to note that the provisions of the Act are penal in nature I and as such, they must be construed strictly.

In the present case, the car, suspected to be illegal property, was seized under s 25, and by virtue of s 35 where any proceeding is brought against

any property on the ground that such property is illegal property, the Court shall presume that property to be illegal property. The presumption however, is rebuttable by admissible evidence. A

Section 35 is clear in its provisions. Thus, with respect, I do not agree with counsel's contention that the presumption is not applicable to the appellant. Besides Azlin, the appellant was also a person 'proceeded against' in the claim proceeding, for the proceeding under s 32(3) is a proceeding within the meaning of 'any proceedings' in respect of any illegal property under s 35 of the Act. Thus in this case, the presumption is equally applicable to the appellant. B

However, having considered the arguments advanced by both parties and having carefully read the record, I come to the conclusion that there is much merit in the appeal. In my judgment, the presumption of illegal property under s 35 has been rebutted by the appellant. It is erroneous on the part of the sessions court judge to hold otherwise. The facts of the case show that the car was never an illegal property right from the inception. The car was bought by the appellant and was hired out to Mohd Anwar under the hire purchase agreement the terms of which clearly prohibits the transfer of the car to a third party without the appellant's consent. Furthermore, the evidence of the alleged purchase by Azlin was not substantiated. Apart from his bare claim that he had bought the car from Mohd Anwar, there is not an iota of evidence to support the transaction. Azlin's evidence that he had bought the car from the proceeds of dadah is vague and should not be accepted without corroboration. Azlin is a self-confessed criminal whose evidence must be treated with caution. In examination-in-chief he testified that the sum RM15,000 that he paid for the purchase of the car came from his satay business and later while under re-examination, he changed his evidence somewhat and said, 'Pembelian kereta itu adalah dari hasil perniagaan satay dan sedikit sebanyak dari hasil dadah.' C D E F

This piece of evidence 'sedikit sebanyak dari hasil dadah' is inadequate to support the fact that the car was illegally obtained. Thus, in the absence of any specific finding over the credibility of Azlin's evidence by the sessions court, it is not safe for the Court to rely upon Azlin's evidence and consequently to hold that the car was illegal property merely on that sketchy evidence and to subsequently order the car to be forfeited on that ground. On evidence, I am of the opinion that the car is not illegal property as defined under s 2 of the Act. G

Moreover, in this case, the car was not even the subject matter of any offence under the Act or under the DDA, and this fact was confirmed by the learned deputy public prosecutor. H

Such being the case, and since the appellant has established that it was lawfully entitled to the car, and that the car was not illegal property, and that no offence has been committed in respect of the car, it should therefore be released to the appellant. In the circumtances of this case, Azlin is not lawfully entitled to the car. I

A *Conclusion*

Finally, I am of the view that the order of forfeiture was wrongly made and I would therefore allow the appeal and set aside the order of the sessions court judge. Accordingly, I order the release of the car to the appellant.

B *Appeal allowed.*

Reported by Benjamin Yong

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